

No. 11,856

IN THE

United States Circuit Court of Appeals
For the Ninth Circuit

BUDGET FINANCE PLAN, INC.,
a corporation,

Appellant.

vs.

JOHN O. ENGLAND, etc., Trustee of
Estate of Buddie Jerome Hayner,
bankrupt,

Appellee.

APPELLANT'S OPENING BRIEF.

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PAUL P. O'BRIEN,

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JURISDICTIONAL STATEMENT.

This is an appeal from an order of the District Court of the United States for the Northern District of California, Southern Division. The said order is set forth in the record herein. (R. p. 54.)

Appellant, Budget Finance Plan, Inc., is a corporation organized and existing under and by virtue of the laws of the State of California, and authorized to do business therein. Appellee, John O. England, is Trustee of the Estate of Buddie Jerome Hayner, bankrupt, in the matter of said bankruptcy proceedings pending before said District Court.

The action arises out of the petition for reclamation of appellant (R. pp. 2-6) and order to show cause (R. pp. 6 and 7) instituted to recover from said Trustee certain chattels theretofore hypothecated by said Buddie Jerome Hayner, hereinafter called bankrupt, to secure his promissory note to appellant, certain of which chattels, consisting of three motor vehicles, were, at the time of filing said petition, of a value less than the balance of \$4,787.10 then due on said note, said value being in the aggregate not in excess of \$4,200.00. (R. pp. 83-85.)

Said petition for reclamation was filed July 15, 1947. Appellee as Trustee filed his answer July 17, 1947. After hearing duly and regularly had the Referee made and filed his order denying petition for reclamation on July 31, 1947. (R. pp. 9-12.)

On August 9, 1947, pursuant to the provisions of Title 11, Section 67, U.S.C., appellant filed its petition for review. (R. pp. 13-16.) On October 27, 1947, Referee filed his certificate and report on petition for review. (R. pp. 17-53.)

The petition was heard before the District Court November 10, 1947, and said Court made its order confirming Referee's order denying petition for reclamation (R. p. 54) on November 17, 1947. Under authority of Judicial Code, Title 28, U.S.C., Section 225, and Bankruptcy Code, Title 11, U.S.C., Sections 47 and 48, appeal was taken to this Court to review the said order of the Court below, notice of appeal filed December 10, 1947. (R. p. 55.) On January 19, 1948,

the District Court extended the time for filing the record on appeal to February 28, 1948. (R. p. 63.) This appeal and the transcript of record were filed and docketed in this Court on February 13, 1948.

STATEMENT OF THE CASE.

(a) Nature of the Case.

On February 18, 1947, bankrupt executed his certain promissory note in the principal sum of \$5,000.00, secured by a chattel mortgage of the same date, to appellant. The said mortgage covered certain machinery and equipment, together with three motor vehicles, to-wit: a 1941 Ford truck, a 1940 Chevrolet truck, and a 1946 Buick sedan. (Exhibit No. 2.)

At the time of the transaction the said vehicle stood respectively in the names of the Universal CIT Corporation, Bank of Pinole, and Bank of Berkeley, as legal owners, as that term is defined in Section 67, Vehicle Code, State of California, which is as follows:

“Legal Owner. ‘Legal owner is a person holding the legal title to a vehicle under a conditional sale contract, the mortgagee of a vehicle. * * *’”

(R. p. 76.) The bankrupt was never at any time legal owner of said vehicles, or any of them. (R. p. 77.) Title was so held as security for obligations of the bankrupt in the total sum of \$4,024.30 on said date. (R. p. 67.) Of the sum of \$5,000.00 loaned by appellant to bankrupt, the said sum of \$4,024.30, on written authorization of the bankrupt, was paid by appellant

directly to said legal owners. (Exhibit No. 3, R. p. 76.) Sometime thereafter, the exact date being unknown, (R. p. 88) appellant received said legal titles from the former holders thereof, or "pink slips" as they are commonly known, and on March 21, 1947, forwarded to the Department of Motor Vehicles, Sacramento, a certified copy of said chattel mortgage, necessary fees, and certificates of ownership. (R. p. 87.)

At the date of execution of the mortgage, and for about two months thereafter, the certificates of registration were in the possession of the Department of Motor Vehicles on bankrupt's application for registration for the year 1947. (R. pp. 77, 79.)

On April 17, 1947, the Department of Motor Vehicles, Sacramento, advised appellant by letter that the department was *holding* said certified copy of chattel mortgage, certificates of ownership, and fees for the reason that: "We require Registration card last issued." (Exhibit No. 4.)

On May 17, 1947, bankrupt filed in said District Court his voluntary petition in bankruptcy and was adjudicated a bankrupt on May 19, 1947. Thereafter, and prior to filing appellant's petition for reclamation said trustee took possession of said motor vehicles. By stipulation of counsel for the parties hereto, filed in said bankruptcy proceedings, the said motor vehicles have been sold and the proceeds impounded pending final determination of said Referee's order denying petition for reclamation.

(b) Issues Presented.

On the basis of the foregoing facts the Referee found that the said mortgage was executed on February 18, 1947, and offered for registration on March 21, 1947. The Referee further found that the said mortgage was not offered for registration within a reasonable time after its execution and was and is therefore void against all creditors who became such prior to the date of registration, and as a conclusion of law held that the failure to offer said mortgage for registration until said date aforesaid was an unreasonable delay, and that said mortgage is void as to creditors as aforesaid. (R. pp. 10-12.)

Appellant raises no issue as to the machinery or equipment included in said chattel mortgage, and has heretofore abandoned claim thereto. (R. p. 12.)

Based upon the foregoing statement of the nature of the case and summary of facts, the issues presented are:

1. Whether the said chattel mortgage on the motor vehicles is valid as against the creditors regardless of when they became creditors, said mortgage having been executed on February 18, 1947, and forwarded to the Department of Motor Vehicles on March 21, 1947, because of unavoidable delay in obtaining registration certificates.

2. Whether a refinancing mortgage comes within the intendment of Sections 195 and 196 of the Vehicle Code of the State of California.

STATUTES INVOLVED.

Section 195, Vehicle Code, State of California:

“No chattel mortgage on any vehicle registered hereunder irrespective of whether such registration was effected prior or subsequent to the execution of such mortgage, is valid as against creditors or subsequent purchasers, or encumbrancers until the mortgagee or his successor or assignee has deposited with the department, at its office in Sacramento, a copy of said mortgage with an attached certificate of a notary public stating that the same is a true and correct copy of the original, accompanied by a properly endorsed certificate of ownership to the vehicle described in said mortgage if said vehicle is then registered hereunder, or if said vehicle is not so registered, by an application in usual form for an original registration, together with an application for registration as legal owner, and upon payment of the fees as provided in this code.”

Section 196, Vehicle Code, State of California:

“When the chattel mortgagee, his successor or assignee, has deposited with the department a copy of the chattel mortgage as provided in section 195 hereof, such deposit constitutes constructive notice of said mortgage and its contents to creditors and subsequent purchasers and encumbrancers but such mortgaged vehicle shall be subject to a lien as provided in Division VIII hereof.”

SPECIFICATION OF ERRORS.

1. The District Court erred in confirming Referee's Order Denying Petition For Reclamation.

2. The District Court erred in confirming findings of fact 4 of said order in that said findings of fact are not supported by the evidence and are contrary to law, as set forth in argument herein.

3. The District Court erred in confirming findings of fact 5 of said order in that said findings of fact are not supported by the evidence and are contrary to law, as set forth in argument herein.

4. The District Court erred in confirming conclusions of law 1 of said order in that said conclusions of law are not supported by the evidence and are contrary to law, as set forth in argument herein.

5. The District Court erred in confirming said order in that said order is clearly erroneous and contrary to the evidence insofar as it finds or holds that the delay, if any, in offering the chattel mortgage for registration with the Department of Motor Vehicles was or is unreasonable, or finds or holds that the chattel mortgage on said motor vehicles was or is invalid or void for any reason.

6. The District Court erred in not making its order reversing said Order Denying Petition for Reclamation and directing appellee to deliver possession of said motor vehicles to appellant free and clear of claims of creditors of said bankrupt.

ARGUMENT.

In presenting its argument appellant believes that all the facts essential thereto have been summarized, with appropriate references to the transcript of record in its statement of the case and, therefore, in the interest of brevity, will rely upon such statement of facts except where further detail requires specific references. It should be noted that the original exhibits are before this Court in their usual form. (R. p. 100.)

I.**THE EVIDENCE IS INSUFFICIENT TO SUPPORT THE FINDING THAT THE MORTGAGE IS INVALID OR VOID AS TO CREDITORS BECAUSE OF DELAY IN REGISTRATION.**

Appellant held the chattel mortgage in its office after the 18th of February for the sole reason that it was conscious of the fact that the motor vehicle department would not accept the same for registration in the absence of the certificates of registration which were out of appellant's control. Mr. Ahrens, an officer of appellant, so testified (R. p. 88). That he was correct in this assumption is borne out by the letter of the motor vehicle department written *after* appellant had forwarded all available documents specified in Sections 195 and 196, Vehicle Code of California, in which the department stated they were *holding* the mortgage and accompanying matter awaiting the registration certificates. Since these were not received by appellant until after March 21,

1947, it is apparent that for appellant to have forwarded the documents in its possession at an earlier date would have been equally unavailing. (Exhibit No. 4.)

This conduct on the part of appellant, if it be a delay, is excusable delay, as the authorities of this Circuit so hold.

The rule is stated in *In re Mercury Engineering, Inc.*, 68 Fed. Sup. 376 (D. C. S. D. Cal.) at page 380: that the requirement of prompt recording is satisfied "only if the recording is done promptly, unless such recording is impractical *or the circumstances of the case warrant delay.*" (Italics ours.)

In the *Mercury* case the mortgagee withheld recordation 26 days for purposes of his own convenience. The Court there recognized that the mortgage *could have been recorded at the time of its execution*, but held that it was proper for the mortgagee, in the exercise of *good business sense* and sound legal principles, and for reasons of his own, to withhold it from recordation for the time which, in that instance, the mortgagee chose.

Where the delay arising out of matters of the mortgagee's convenience is not a sufficient basis for declaring the mortgage invalid, it must follow that, as a matter of law, a delay imposed upon appellant by circumstances over which it had neither power nor control is such delay as the circumstances of the case warrant, and the requirement of prompt recording has in this instance been fully satisfied.

A recent decision in this Circuit, *Citizens National Trust and Savings Bank of Los Angeles v. Gardner*, 161 Fed. 2d 530, cites the *Mercury* case with approval on the point here involved. The facts of the case strongly resemble those before this Court insofar as the question of delay of recordation is concerned. In that case the mortgagee appealed from an adverse decision of the Bankruptcy Court, affirmed by the District Court, declaring void a chattel mortgage on the grounds, among others, that mortgagee was guilty of an unreasonable delay in registration of the chattel mortgage with the department of motor vehicles. Chronologically, the mortgage was executed May 4, 1945, and deposited in escrow the same date. On May 19, the escrow was closed and the mortgage delivered to appellant. The mortgage was recorded with the County Recorder on the 24th, but delivery of the certificates of ownership of the vehicles, or "pink slips", was not accomplished until June 3 or 4, 1945. The reason for this delay was the fact that the said certificates were in the department of motor vehicles to complete transfer of ownership to the mortgagors which would enable them in turn to transfer legal title to the mortgagee. Appellant in that case forwarded the certificates of title and a copy of the mortgage to the department of motor vehicles on June 8, 1945. Thereafter the mortgagors were adjudicated bankrupts and the trustee instituted said action for the recovery of said vehicles as stated.

In reversing the order of the District Court the Circuit Court held that the evidence was *not* suf-

ficient to support the finding that appellant failed to act promptly in depositing the chattel mortgage with the department of motor vehicles. Although the escrow was closed and appellant received the chattel mortgage on May 19, since the certificates of ownership were not received by the mortgagee until June 3 or 4, the Court stated, at page 533, that it was not until the latter date that "appellant was in a position to comply with the requirements of said section," and that, as to the fact that the certificates were forwarded on June 8: "We think this constituted sufficiently prompt action".

Since the delays of 26 days in the *Mercury* case and 20 days in the *Gardner* case were properly construed as reasonable it is obvious that the determining factor is not the *period* but rather the *cause* of the delay which is determinative of the question whether or not in any particular instance the mortgage is valid as to creditors despite a delay in recordation. Thus it cannot be said that in the instant case the delay in and of itself was an unreasonable one.

It should be noted that appellant's mortgage involved the refinancing of prior liens on said vehicles in an amount representing the major portion of the loan to bankrupt. Having in mind, therefore, that legal title to the vehicles stood of record in persons other than the bankrupt, appellant, in temporarily withholding registration of the chattel mortgage awaiting receipt of the certificates of registration, would be justified in assuming that the possibility of

prejudice to creditors, encumbrancers or purchasers thereby would be nonexistent.

This factor, coupled with the stated requirements of the Department of Motor Vehicles as set forth in its letter of April 17 (Exhibit No. 4) demonstrating that until the certificates of registration were delivered the department would do no more than "hold" the chattel mortgage, establishes conclusively that appellant did not delay beyond a reasonable time. Appellant was fully cognizant of the requirements of the department and Mr. Ahrens, one of its officers, testified (R. 88):

"Q. Can you tell us any reason for waiting from February 18th to March 21st before sending the transmittal with the necessary papers to Sacramento?

A. Yes, because Mr. Hayner did not have the registration slips and in order to complete the due filing with the Department of Motor Vehicles, they require that you have accompanying the chattels, the ownership certificates and also the registration certificates before they will complete the final recordation of it."

Appellant's position is a stronger one than that of the mortgagee in the *Mercury* case, and certainly no less sound than that of the mortgagee in the *Gardner* case. It must necessarily follow that there is not sufficient evidence to sustain the finding that appellant's mortgage is invalid or that appellant failed to register the same within a reasonable time.

II.

REFINANCING MORTGAGE SHOULD BE HELD SAME AS PURCHASE MORTGAGE IN RESPECT TO RECORDING STATUTES.

The California State Courts have construed the general chattel mortgage recording statute, Section 2957, Civil Code of California, in *pari materia* with Section 3440 of the Civil Code, as requiring recordation as a substitute for change of possession, *Ruggles v. Cannedy*, 127 Cal. 290. It is also a matter of judicial decision that the requirements of Section 2957, Civil Code, find their equivalent as to motor vehicle mortgages in Section 195, Vehicle Code, *Bank of America v. Sampsell*, 114 Fed. 2d 211.

In the *Mercury* case, at page 379, the Court states that the object of the recording statutes is to protect creditors against surreptitious sale or incumbrance, but finds an exception in regard to the application of Civil Code Section 3440 to a purchase money mortgage insofar as the requirement of notice of intention to mortgage is concerned, holding that a purchase money mortgage is not within the intentment of the act. The Court reasons:

“But when the incumbrance is to secure moneys which represented the price for these assets, the reason for the requirement disappears. For to hold that the seller who, instead of receiving cash, acquires a mortgage on property which he transfers to a buyer, must subordinate his rights to this buyer’s other creditors, is to penalize him for supplying to the buyer the very means of carrying on his trade”.

The *Gardner* case cites the *Mercury* decision with approval and in following the rule states, at page 533:

“We do not consider the question of whether the mortgage is a true purchase money mortgage is controlling. The determining factor is whether aid is extended in acquiring rather than in disposing of assets”.

Insofar as the loan in the instant case was for the purpose of and did effect a refinancing of the encumbrances on the motor vehicles the transaction was a granting of *aid* in *preserving* rather than disposing of assets, and the mortgage falls in the same category as a purchase money mortgage. Thus, as stated in the *Mercury* case, “the reason for the requirement (of the recording statute) disappears”. In no sense could appellant’s mortgage constitute a secret lien, regardless of registration, since legal title to the vehicle was *never at any time* in the bankrupt.

At best, the bankrupt had but a limited interest in the vehicles when the mortgage was executed. Appellant acquired legal title from sources other than the bankrupt and in fact it would have been possible for appellant to have acquired the interests of the third parties holding said legal titles *without the consent of the bankrupt*. Section 183, Vehicle Code of California, provides:

“A legal owner may assign his title or interest in or to a vehicle registered hereunder to a person other than the owner without the consent of and without affecting the interest of such owner.

* * *”

Under all of these circumstances it would appear that appellant's mortgage is beyond the intendment of Vehicle Code Section 195 in the same sense that a purchase money mortgage is outside the intendment of Civil Code Section 3440, and that therefore said mortgage is valid as to creditors regardless of when their claims arose.

CONCLUSION.

It is respectfully urged that Order of the District Court confirming the Order of the Referee in Bankruptcy denying appellant's petition for reclamation be reversed, and that by appropriate order the said chattel mortgage be declared valid and the Trustee in Bankruptcy be directed to deliver the impounded funds, held in substitution for said motor vehicles, to appellant free and clear of the claims of said bankrupt or his creditors.

Dated, San Francisco, California,

April 19, 1948.

Respectfully submitted,

CARROLL F. JACOBY,

Attorney for Appellant.

